

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

LARRY NYFIELD,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 1999-202
)	
VIRGIN ISLANDS TELEPHONE CORP., ST.)	
CROIX CABLE TV, INC., INNOVATIVE)	
COMMUNICATIONS CORP., and JEFFREY)	
PROSSER,)	
)	
Defendants.)	

ATTORNEYS:

Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
For the plaintiff,

Kevin A. Rames, Esq.
St. Croix, U.S.V.I.
For the defendants.

MEMORANDUM

Moore, J.

This matter is before the Court on defendant Jeffrey Prosser's ["Prosser" or "defendant"] appeal from the Magistrate Judge's order entered August 16, 2001 denying his motion for a protective order and ordering the parties to cooperate in scheduling the defendant's deposition at the earliest convenience. (See Order at 5 (D.V.I. St. Croix Div. Aug. 16, 2001.)

BACKGROUND

On July 16, 2001, Prosser moved for a protective order that would prevent the plaintiff from taking his deposition. His request was based on the ground that, as the CEO of Innovative Communications Corp. ["ICC"], the Court should not burden him with irrelevant and burdensome discovery requests. (See Mem. Supp. Mot. Protective Order at 2, 4-5.) More specifically, he asserted that the Court should not "permit his deposition to take place until Plaintiff has proffered sufficient facts showing he had any personal involvement in the matters complained of." (See *id.* at 2.)

Magistrate Judge Jeffrey L. Resnick denied the defendant's request on the grounds that (1) Prosser is a named defendant in this action who has not moved to dismiss himself from the action as an improper defendant; (2) the plaintiff's exhibits demonstrated that the decision complained of required the approval of Prosser and that Prosser exercised "hands-on control of other employment matters in the ICC conglomerate"; (3) that Prosser had not averred any lack of knowledge of the disputed matters; and (4) that an opposing party must be able to depose those officers and employees who approved a particular action "[w]hen the motives behind corporate action are at issue." (See Order at 3-5, quoting *Traveler's Rental Co., Inc. v. Ford*

Motor Co., 116 F.R.D. 140-142 (D. Mass. 1987).) This timely appeal followed.

DISCUSSION

A magistrate judge may hear and decide nondispositive pretrial matters such as Prosser's motion for a protective order. See 28 U.S.C. § 636(b)(1)(A);¹ FED. R. CIV. P. 72(a); LRCi 72.1. Pursuant to Rule 72(a) and LRCi 72.1, a party may seek review of the Magistrate Judge's order by appealing to this Court within ten days after being served with a copy of the order. On appeal, the district court "may reconsider any pretrial matter . . . where it has been shown that the magistrate's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); see *Continental Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 248-50 (3d Cir. 1998).

In his appeal, the defendant argues that Magistrate Judge Resnick improperly considered evidence attached as exhibits to

¹ That section provides, in relevant part:

(b)(1) Notwithstanding any provision of law to the contrary --(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, . . . to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A).

the plaintiff's opposition to the defendant's motion. This argument depends almost exclusively, however, on the defendant's characterization of the plaintiff's opposition to Prosser's motion. The defendant asserts that the opposition filed on July 31, 2001 was in fact a *second* opposition, which he asserts is not permitted by our Local Rule 7.1.² In response, the plaintiff points out that he expressly responded in two separate parts to the defendant's multi-part motion for a protective order in two parts, responding first to that part of the motion relevant to depositions already scheduled for July 31, 2001 and separating out for later, timely response the portion of the motion relevant to the defendant. (See Pl.'s Mem. Supp. Partial Opp'n at 1.) The Magistrate Judge considered both partial oppositions together, noting that the plaintiff had responded separately to the separate requests regarding the separate persons and issues involved. (See Order at 1.) There is no indication in the record that the defendant objected to the plaintiff's two-part opposition before the matter was decided by Magistrate Judge Resnick, nor did the defendant move for reconsideration on that ground after the motion was denied. In any event, the response

² LRCi 7.1(g) provides:

Only a motion, a response in opposition, and a reply may be served on counsel and filed with the court; further response or reply may be made only by leave of court obtained before filing (counsel will be sanctioned for violation of this limitation).

in opposition filed with respect to the deposition of Prosser was the only response filed in opposition to that particular request, the plaintiff having expressly indicated that he would file his response to that portion of the motion by the deadline set by the rules.

Magistrate Judge Resnick's consideration of the response in opposition specifically relating to Prosser's request for a protective order was neither clearly erroneous nor contrary to law. Moreover, the defendant's failure to assert before the Magistrate Judge in the first instance the allegedly improperly filed "second" opposition constitutes waiver of that issue on appeal before this Court. See *Cooper Hospital/University Med. Ctr. v. Sullivan*, 183 F.R.D. 135, 142 (D.N.J. 1998) (relying on the policy reasons behind the Federal Magistrate's Act of 1968 as stated by the Court of Appeals in *Continental Casualty Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 250 (3d Cir. 1998) to conclude that the appellant "was required to raise all grounds in support of its motion for a protective order [Its] failure to do so constitutes a waiver of its right to assert that ground before this Court"); see also *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 177 F.R.D. 205, 209-213 (D.N.J. 1997) (declining to consider appellant's argument raised for the first time on appeal to the district court); *Health Corp. of America v.*

New Jersey Dental Assoc., 77 F.R.D. 488, 491 (D.N.J. 1978)

(reaching the same conclusion).³

Finally, Prosser's assertion that the plaintiff failed to proffer sufficient facts to show that he had personal knowledge of the allegedly injurious corporate acts is baseless. As the party seeking a protective order, Prosser carried the burden before the Magistrate Judge to demonstrate that "good cause" exists for protecting him from deposition discovery. FED. R. CIV. P. 26(c); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995). "'Good cause'" is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury." *Id.* (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994). Further, "[b]road allegations of harm, unsubstantiated by specific examples, however, will not suffice." *Id.* As noted by Magistrate Judge Resnick, Prosser did not aver lack of knowledge of the disputed matters, which are clearly relevant to the plaintiff's allegations. In any event, given the full record properly before the Magistrate Judge, this Court agrees that Mr. Prosser failed to carry his burden of demonstrating "good cause" as required by Rule 26(c).

³ For the same reason, evidence in the form of affidavits proffered by the defendant for the first time on appeal will not be considered by this Court in determining the propriety of Magistrate Judge.

Nyfield v. VITELCO
Civ. No. 1999-202
Memorandum
Page 7

Accordingly, Magistrate Judge Resnick's order of August 16, 2001, denying the motion for a protective order will be affirmed.

An appropriate order follows.

ENTERED this 29th day of January, 2002.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF CROIX

LARRY NYFIELD,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 1999-202
)	
VIRGIN ISLANDS TELEPHONE CORP., ST.)	
CROIX CABLE TV, INC., INNOVATIVE)	
COMMUNICATIONS CORP., and JEFFREY)	
PROSSER,)	
)	
Defendants.)	

ATTORNEYS:

Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
For the plaintiff,

Kevin A. Rames, Esq.
St. Croix, U.S.V.I.
For the defendants.

ORDER

For the reasons stated in the accompanying Order of even date, Magistrate Judge Jeffrey L. Resnick's Order of August 16, 2001 is hereby **AFFIRMED**.

ENTERED this 29th day of January, 2002.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

Nyfield v. VITELCO
Civ. 1999-202
Order
page 2

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
Honorable Raymond L. Finch
Honorable Jeffrey L. Resnick
Hon. Geoffrey W. Barnard

Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
Kevin A. Rames, Esq.,
St. Croix, U.S.V.I.

Mrs. Jackson
St. Thomas law clerks